

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 11TH JULY 2007 / 20TH ASHADHA 1929

WP(C).No. 21345 of 2006(N)

**AGAINST THE ORDER IN EP 71/2005 IN
OS.580/1998 of MUNSIF COURT,PATHANAMTHITTA**
.....

PETITIONER:

**K.K. JOHN, AGED 68 YEARS,
S/O.KUNJU, RESIDING AT KUNNATH HAPPY VILLA,
PATHANAMTHITTA.**

BY ADV. SRI.K.A.MANZOOR ALI

RESPONDENTS:

- 1. MARY KOSHY, AGED 70 YEARS,
W/O. KOSHY, THAVALATHIL, OMMALLOOR VILLAGE,
PATHANAMTHITTA.**
- 2. CHINNAMMA VARGHESE, AGED 61 YEARS,
W/O. VARGHESE, RESIDING AT MARATHETHUVEETIL,
AZHOOR, PATHANAMTHITTA.**

R1 BY ADV. SRI.JACOB P.ALEX

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 11/07/2007, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

KSS

WPC.NO.21345/2006 N

APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1: COPY OF THE COMMISSION REPORT IN I.A.2641/98
IN O.S.580/98 DTD. 9/12/98.**
- EXT.P2; COPY OF THE COMPROMISE DECREE IN O.S.580/98.**
- EXT.P3: COPY OF THE COMMISSION REPORT IN I.A.572/05 IN
O.S.148/05 DTD. 19/03/2005.**
- EXT.P4: COPY OF THE COMMISSION REPORT IN E.P.NO.71/2005
IN O.S.NO.580/1998 DTD. 5/08/2005.**
- EXT.P5: COPY OF THE ORDER IN E.P.NO.71/05 IN O.S.NO.580/98
DTD. 12/07/2006.**

1ST RESPONDENT'S EXHIBIT:

- EXT.R1(A): COPY OF AWARD DTD. 13/07/2002 PASSED BY LOK ADALAT
IN O.S.580 OF 1998.**

ADCOATE COMMISSIONER'S ANNEXURES:

- ANNEXURE C1: COPY OF THE NOTICE SERVED TO THE COUNSELS
FOR THE PARTIES.**
- ANNEXURE C2: COPY OF PLAN.**
- ANNEXURE C3: CD OF PHOTOGRAPHS.**

/TRUE COPY/

P.A.TO JUDGE

Kss

PIUS C. KURIAKOSE, J.

.....
W.P.(C)No.21345 OF 2006
.....

DATED THIS THE 11TH JULY, 2007

J U D G M E N T

The 2nd judgment-debtor in a compromise decree passed by the Lok Adalat, under which the parties agreed to level the laterite formation situated on the north-western corner of the plaint schedule property for user of the same as a pathway and also that the parties will not enclose such portion or make any obstruction to the user of such pathway by the decree-holder plaintiff, is aggrieved by the order passed by the execution court finding that in violation of the compromise decree, the petitioner constructed a staircase. The said order produced as Ext.P5 and impugned in this Writ Petition under Article 227 directs the petitioner to remove the staircase from its place and leave the space open so that the 2nd respondent-decree-holder can use the same as a pathway and it is also stated that in case the petitioner does not comply with order, it will be open to the 2nd respondent to approach the court for compelling removal of the staircase through court. Ext.P5 order was passed by the learned Munsiff after holding an enquiry in which three witnesses, viz., the decree-holder (PW.1), Smt.T.R.Ajithakumari and P.Soman Pillai, Advocate Commissioners (Pws.2 and 3), were examined. The

commissioner's report and sketches were marked as Exts.C1 series to Ext.C2(b). Documentary evidence consisted of Exts.A1 and A2 on the side of the decree-holder and Ext.B1 (which is copy of the approved plan of the petitioner's building) on the side of the petitioner. The execution petition was filed by the 2nd respondent alleging that after levelling the laterite formation, what the petitioner did was not to keep the area as a pathway as directed under the decree, but to construct a staircase thereon in violation of the compromise decree and the prayer in the execution petition is that the staircase be removed in execution of the decree. The petitioner filed objections, contending that he has not violated the compromise decree; that the properties of the petitioner and the decree-holder are separated by clear boundary wall; and that Kumbazha-Pathanamthitta public road is situated on the north of the plaint schedule building and the building of the petitioner. The road was widened in the year 2003, annexing northern portion of the property belonging to the parties for the construction of a drainage. Now the properties of both parties are lying at 2 ½ feet below the road level. It is also contended that the decree-holder had no way on the western side of her building and she was entering into her building from the public road through a passage in the middle portion of the

building. The staircase and entire building belonging to him has been constructed by the petitioner in accordance with the approved plan and he is not liable to remove the same. This Court appointed an advocate commissioner, Mr.Varghese M.Easo for ascertaining the properties of the parties by the side measurements mentioned in the respective title documents; the age of the staircase; as from which all rooms on the west and east of the alleged pathway there is access provided to the alleged pathway; as to whether the northern boundary of the buildings of the parties is in a straight line parallel to the Pathanamthitta-Kumbazha road and also as to what is the distance of the starting point of the staircase from the northern boundary line of the buildings of the plaintiff and the defendants. Pursuant to the order, the advocate commissioner inspected the properties and submitted report. Inter alia it is reported that the alleged pathway has an open strip between the building of the petitioner in the west and the boudnary wall on the east of that building and does not have any access through the south from the property of the petitioner. The staircase is on the northern end of the pathway. The staircase which is now obstructing the entry to the alleged pathway from the northern side is about three years old in appearance. It is a temporary structure with GI pipes for

handrails and the steps with metal sheets and iron bars. The staircase is constructed touching both buildings and providing access to the first floor of the petitioner's building. It is also stated that from the alleged pathway, there is no access to either rooms in any of the buildings of both parties. No entry doors are seen either on the west or east of the alleged pathway. There is a way to the writ petitioner's property from the alleged pathway in its southern end. The entry to the pathway from the northern side is completely prevented by the staircase and a metal gate opening from the backside of the lottery room which is under the staircase fittings. The advocate commissioner took certain digital photographs of the properties and has produced the same in a CD as Annexure-C3.

2. Ext.P1 produced along with the Writ Petition is copy of report of advocate commission taken out by the plaintiff along with the suit. Ext.P2 is copy of the decree which is passed on the basis of settlement in the Adalat. The award of the Adalat is produced by the plaintiff along with her counter and the same is clearly to the effect that the lateral formation shall be levelled and cleared for use as a pathway by the plaintiff and that the defendants shall not close down the pathway or do anything which will hinder the plaintiff's uninterrupted user of the

pathway. Ext.P2 is dated 13th July, 2002.

3. The question before the court below was whether Ext.P2 decree had been violated by the second judgment debtor petitioner and as to whether the decree could be enforced against him. Enquiry was conducted into that question and the evidence consisted on the side of the respondent decree holder of Ext. A1 copy of the plaint in O.S. 580/98, Ext. A2 copy of plaint in OS.148/05 and the oral testimonies of Pws.1 to 3. On the side of the petitioner second judgment debtor, evidence consisted of Ext. B1 copy of approved plan in respect of his building. Court exhibits consisted of Ext. C-1 series, copy of commission report, mahazar and sketch submitted by Advocate Smt.T.R.Ajithakumari and C-2 series of commission report, mahazar and sketch submitted by Advocate Sri.P.Soman Pillai. Learned Munsiff rightly placed reliance on the testimony of PW-2 Advocate Smt. T.R. Ajithakumari who had occasion to visit the property twice. Smt.Ajithakumari was the Commissioner appointed in OS.580/98 and it was considering the fact that she had occasion to visit the site once that she herself was appointed as commissioner in O.S. 148/05. It is seen that the learned Munsiff found that PW-2 Ajithakumari is the most competent person to speak about the present

position of the laterite formation, she having visited the property twice. The first visit having been before the levelling of the laterite foundation and the second visit in OS.148/05 being after its level. Smt. Ahjithakumari, the court noticed had given evidence to the effect that the stair case put up by the petitioner is constructed at the place of the original laterite foundation. Construction of the stair case, learned Munsiff found, is obviously in violation of the terms of the compromise decree Ext.P2. This court deputed a commission at the instance of the petitioner and that commissioner has filed a report. I have heard the submissions of learned counsel for the petitioner Sri.Manzoor Ali K.A. and those of Sri.Jacob Alex, learned counsel for the contesting respondent, R1. Placing reliance on the report submitted by Advocate Sri. Varghese M.Easo, Commissioner appointed by this court, Sri.Manzoor Ali would assail the impugned order of the learned Munsiff. Sri.Jacob Alex on the contrary would justify the impugned order.

4. As rightly argued by Sri.Jacob Alex, the existence or non-existence of the laterite foundation has nothing to do with the respondent's right of way which has been specifically protected in Ext.R1(a) award. It is not difficult to accept the argument that there was a way and that the first respondent and his tenant were using

that way for reaching south-western side of the plaint schedule property and that right to make use of that way which is protected in Ext.R1(a) award. Having gaged the impugned order Ext.P5 by the yardsticks that are applicable to the exercise of special jurisdiction of this court under Article 227 I am of the view that Ext.P5 cannot be said to be vitiated to the extent of justifying interference under that jurisdiction which is invoked only in exceptional circumstances. The report of the Advocate Commissioner appointed by this court also will not improve matters from the point of view of the writ petitioner. Even if that report was available before the learned Munsiff the finding that the stair case in question has been constructed, violated Ext.P2 decree was inevitable. Result is that the challenge against Ext.P5 fails and that the writ petition will stand dismissed.

(PIUS C.KURIAKOSE, JUDGE)

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